HOW FAR CAN COURT PROCEDURE BE SOCIALIZED WITHOUT IMPAIRING INDIVIDUAL RIGHTS[1]

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What do we mean by "socializing" court procedure?

Measuring time by standards appropriate to the development of human institutions, it may be said that until very recently the courts were concerned almost wholly with the adjustment of conflicting claims of individuals and groups against each other, and procedure was meticulously guarded to prevent unjust advantage, for precisely the same reasons that dictated the details of the code duello. The modern tendency toward what is termed the socialization of the courts has produced new tribunals and evolved new functions of older ones in which the aim is not so much the adjudication of private rights as the performance of what are conceived to be community obligations. This tendency chiefly interests the lawyer as it has enlarged the use of the police power to secure the general welfare. It interests the social worker chiefly as it brings directly and conveniently to his aid the judicial machinery through which alone, according to the traditions of free peoples, the state may exercise its ultimate authority in time of peace.

The working out of this tendency toward broader functions and a more human emphasis and aim has involved a more liberal procedure or method of transacting the business of the courts, or at least, of certain courts in which the socializing process has made substantial headway. When a court is acting not as an arbiter of private strife but as the medium of the state's performance of its soverign duties as *parens patriae* and promoter of the general welfare, it is natural that some of the safeguards of judicial contests should be laid aside. This corollary to the main tendency to which we have referred may be fitly styled the socialization of court procedure.

I assume that by "individual rights" in our subject is meant those personal rights recognized by the common law as adopted in the United States and established by constitutions, national and state.

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On the basis of these definitions let us consider the following subdivisions of the general subject proposed by those who have prepared the program:

1. Exclusion of public.
2. Representation by attorneys.
3. Swearing of witnesses.
4. Methods of taking testimony and conformity with rules of evidence.
5. Weight of evidence.
6. Jury trials.
7. Investigation into circumstances of offense.
8. Testimony of probation officers.
9. Use of referee in girls' cases.

The discussion will relate solely to so-called juvenile courts, and my contribution is untechnical, summary and suggestive. So far as I state legal principles I shall undertake to be correct according to interpretations that prevail in my own state, Minnesota. Even were my learning sufficient I could not differentiate here between the several states on points where they do not agree.

I have said "so-called juvenile courts" advisedly. I do not reflect upon those communities where the legislature has not made the radical change from the criminal to the non-criminal type of court in dealing with delinquent children. But has not the time come to reform our terminology in the interests of clear thinking? The court which must direct its procedure even apparently to do something *to* a child because of what he *has done,* is parted from the court which is avowedly concerned only with doing something *for* a child because of what he *is* and *needs,* by a gulf too wide to be bridged by any humanity which the judge may introduce into his hearings, or by the habitual use of corrective rather than punitive methods after conviction. I suspect that the theory of the juvenile court which stresses the moving forward of the common law age of criminal responsibility involves some bad psychology and is responsible for some bad law. Has not the time arrived when no tribunal should claim the title of juvenile court, implying in its origin and major application a jurisdiction and procedure founded wholly on the parental idea, without distinction in aim and essential method between delinquent, dependent and neglected wards of the state, unless this is in its real character? Let other courts be styled what they are—police or criminal courts for children.

But I should not be warranted in excluding courts of the latter sort from this discussion. Therefore, having thus filed my protest, I shall adopt the current nomenclature and refer to all children's courts as juvenile courts.

Another comment, to clear the ground: One too often sees departure from these traditional safeguards of the individual which are familiar in Anglo-Saxon jurisprudence explained and justified by the parental attitude of the juveinle court. Some looseness prevails in this regard, even in the opinions of appellate courts. It should not be forgotten that the performance of judicial functions always involves two processes: the first, to determine whether jurisdiction assumed for the purpose of an inquiry should be retained for the application of a remedy; the second, application of the remedy. The first seeks the facts; the second applies the law to the facts as ascertained. Is it not obvious that the rights of the individual who holds the state at arm's length and says: "The matters charged are false; government has no call to interfere with me" should be more strictly regarded during the first process than the second. when his status as a person with whom public interference is warranted has been established? Otherwise all that is necessary to justify a despotism is to make sure it intends to be benevolent.

Taking up now the suggested sub-topics:

1. *Exclusion of Public.* One who is accused of crime has a constitutional right to a public trial. As to what a public trial is, the courts have differed. If a juvenile court is organized as a criminal court for children any child who comes before it charged with an offense is entitled to a public trial. If the court that deals with him is exercising chancery jurisdiction, no such constitutional right exists; and for the purposes of this discussion non-criminal courts with purely statutory jurisdiction over children will be classed, though not with technical exactness, as courts of chancery jurisdiction. To a mind, "not warped," as somebody has said, "by study and practice of the law" it may seem absurd that the hearing in the case of Johnny Jones must be public if he is charged in a criminal court with stealing, and need not be so if he is charged in a non-criminal court with being delinquent because he stole. I shall not now defend this seeming inconsistency. If it is constitutional law it is binding on the courts and legislatures, and can be changed only by constitutional amendments.

There is no constitutional right to a public hearing when dependency or neglect is the issue; and the court has no right to deny it in cases of "contributing," since here it acts always as a criminal court, whether or not it has also chancery jurisdiction.

Even when the right to a public trial exists much discretion is allowed the judge in the matter of excluding idle onlookers in the interest of public decency or the good order of the court proceedings. Prob-

ably no reasonable exercise of this discretion would ever be questioned by or on behalf of a juvenile delinquent, for the protection of whose sensibilities and reputation it is commonly exercised. Indeed, all doubtful questions that have arisen in my own experience have had reference to *in*clusion rather than *ex*clusion. I have sometimes found it puzzling to know how far it was just to children and their parents to permit their troubles to be heard even by qualified social observers who wished to use the clinical opportunities afforded by court sessions. The smaller the court room, by the way, the simpler the problem both ways.

2. *Representation by Attorneys.* Here also the nature of the proceding is the proper basis for distinctions. In prosecutions for crime, even children, representation by council is a constitutional right. In non-criminal procedings, however, courts of conciliation and small claims have made us familiar with the idea that legal rights are not necessarily violated by the elimination of attorneys. But is it not a moot question? Is not the experience of other judges like my own, that in most cases it is easily possible to make the lawyer who comes into the juvenile court an ally of the court, and interest him in securing the real welfare of those for whom he appears? The absence of antagnostic claims of personal rights makes this the more feasible. I refer, of course, to cases immediately involving children. In "contributing" cases appearance of counsel must be permitted, and in my judgment should be encouraged.

3. *Swearing of Witnesses.* I fancy most judges exercise wide discretion in this regard and are not conscious of any danger to personal rights. I can hardly conceive that if desired by the parties concerned all witnesses would not be sworn. Sometimes essential facts are within the knowledge of a child so young that to put him on oath would seem unreasonable. An obvious corollary to this situation would be the conclusion that his testimony would be unreliable. This would be true in general; and yet skilful questioning by an impartial judge might elicit important and well accredited truth. The discretion to determine the competency of a child to testify has always lain with the court. Would it be any violation of rights for the judge to determine also whether or not to administer the oath? I think not. The greater discretion includes the less.

4. (a) *Methods of Taking Testimony and* (b) *Conformity With Rules of Evidence.*

(a) There can be no question of impairing rights in determining whether to receive testimony from the witness stand or the floor in

front of the judge's table; or whether and to what extent the judge himself shall interrogate witnesses. These and others of like sort are questions of taste and convenience, and the preference of any person fit to act as judge ought to be a safe reliance. As between criminal and non-criminal proceedings interrogation by the court is much more limited in the former, according to usage in the United States.

(b) More serious questions arise in respect to conformity with the rules of evidence. Speaking generally, rules of evidence throughout the United States are the rules of the English common law, variously modified by local statutes, and uniform in their application to all courts deriving authority from the same source—the state or the nation. I do not happen to know of any legislative rule of evidence peculiar to juvenile courts except a Minnesota statute permitting findings upon the written reports of official investigators with like effect as upon testimony received in open court, in "county allowance" or "mothers' pension" cases. Rules of ancient origin, approved or at least tolerated by the community for generations, encountered by the citizen whenever he resorts to other legal forums to assert or defend his rights, should not lightly be set aside in juvenile courts. The only safe practice is to observe them. If hearsay, for example, has not been found justly admissible in civil disputes and criminal trials, it is no better in juvenile court proceedings. Exceptions should be made when appropriate, and informal short cuts will often be found agreeable to all concerned; but the exception should always be recognized as an exception. No judge on any bench has need to be more thoroughly grounded in the principles of evidence and more constantly mindful of them than the judge of a juvenile court. The boy against whom it is proposed to make an official record of misconduct, involving possible curtailment of his freedom at the behest of strangers, has a right to be found delinquent only according to law. The father, however unworthy, who faces a judicial proceeding, the event of which may be to say to him—"This child of your loins is henceforth *not* your child: the state takes him from you as finally as though by the hand of death"—that father may rightfully demand that the tie of blood shall be cut only by the sword of constitutional justice. Surely, those substantial rules of evidence which would protect the boy if the state called its interference "punishment" instead of "protection," and would safeguard the father in the possession of his dog, should apply to issues which may involve the right of the boy to liberty within the family relationship, and the right of the father to his child. The greater the conceded discretion of the judge, the freer he is from the

vigilance of lawyers, the less likely he is to have his mistakes corrected on appeal, so much the more careful should he be to base every judicial conclusion on evidence proper to be received in any court of justice. Otherwise the state's parental power which he embodies is prostituted; the interpreter of the law degenerates into the oriental kadi, and the juvenile court falls into suspicion and disrepute.

5. *Weight of Evidence.* Shall the standard be preponderance of evidence or proof beyond a reasonable doubt? The latter, surely, whenever the proceeding is a criminal one; the former—technically, at least—in dependency and neglect cases. I say "technically," for while a jury would be so instructed, it is certain that the average juror, regardless of instructions, will require something more than a mere tipping of the balance before he will agree to a verdict that may separate protesting parents from their child. And when, as in most cases, the duty to pass upon disputed facts fall to the fallible intelligence of a single person, any judge who realizes his responsibility will insist upon clear proof.

When delinquency cases are heard in non-criminal courts I suppose the true rule to be preponderance of evidence. But here I, at least, must plead guilty to judicial legislation, and I suspect I am not alone in this. When we have minimized the stigma of an adjudication of delinquency in every way that kindly ingenuity may devise, it remains true that in the mind of the child, his family and his acquaintances who know about it, it is practically equivalent to conviction of a criminal offense. In the face of this fact legal theory should give way, and no less evidence should be required than if the hearing were a criminal trial. In the rare instances when I have juries in the juvenile court I instruct them to this effect, and I apply the same test to my own mind in reaching judicial conclusions.

6. *Jury Trials.* It appears to be well settled that in none of the cases heard in non-criminal juvenile courts is there a constitutional right to trial by jury. In Minnesota when juvenile court functions are exercised by the district court, which is the court of general jurisdiction, a jury trial may be demanded. This, however, is a privilege granted, rather than a right confirmed, by the legislature; and the privilege is rarely claimed. Doubtless this situation is typical. When, however, the court is so organized that a child is prosecuted for a criminal violation of a state law, I think it is generally understood that a jury must be called unless specifically waived. The same is true in "contributing" cases, especially when, as in Minnesota, the act or omission is made a misdemeanor.

7. Investigation Into Circumstances of Offense. If there is a question here it must be as to the use to be made of information obtained rather than as to the propriety of a preliminary investigation through agents of the court. The value of such an investigation in suggesting inquiry at the hearing is obvious. But when there are issues of fact to be tried it seems to me equally plain that statements made to an investigator out of court should have no standing as evidence when they are disputed by parties in interest, who by the implications of their denial demand the same right to be confronted with the witnesses against them that is freely recognized in other judicial proceedings. Without attempting a discussion of "due process of law," considerations of public policy seem conclusive. The undisciplined minds of the juveniles and most of the parents who come before the court cannot make clear distinctions between proceedings that are really friendly and paternal and those that are hostile, when the results may be alike in depriving them of liberty of action which they had before they came into court and are unwilling to surrender. Public opinion, too, looks askance upon any abandonment of traditional barriers against governmental interference with the citizen. However wise the judge and kind his purpose, he must have regard to both the individual and the community sense of justice; and Americans have an ingrained conviction that nothing, however well meant, ought to be forced upon them on the basis of information obtained behind their backs.

Let it be observed that I am now discussing policy rather than constitutional rights. As respects non-criminal proceedings, I am not prepared to set limits to the power of the legislature to enlarge and adapt to modern conditions the ancient methods of official inquisition. Professor Wigmore speaks of an increasing need "for the more liberal recognition of an authority such as would make admissible various sorts of reports dealing with matters seldom disputable and only provable otherwise at disproportionate inconvenience and cost." "This policy," he says, "when judiciously employed, greatly facilitates the production of evidence without introducing loose methods." (Evidence, Vol. III, Sec. 1672.)

It is probable that as socialization of the courts proceeds the tendency toward the use of this form of evidence will grow stronger; but popular prejudices must be reckoned with, and procedural convenience will be dearly bought if the cost be impairment of the general confidence in the administration of justice.

When, however, the adjudication is made the situation changes. It has been lawfully determined that the facts warrant the interference

of the court. The nature and extent of that interference is discretionary with the judge within the limits set by the law. In exercising his discretion he may rely upon anything that brings conviction to his mind, and the parties concerned have no legal right to question the sources of his information. Here official investigation is a proper and valuable aid, whether made before or after the adjudication.

8. *Testimony of Probation Officers.* No legal right seems to be involved: the question is rather one of expediency. In my judgment the probation officer should not appear as a hostile factor in court proceedings. The friendly relations with child and family that are essential to his corrective and constructive work would thus be jeopardized in advance. Should adverse information after probation is ordered be disclosed to the court? By all means if it is important. No confidences should be received on condition of concealment. The probation officer is the eyes and ears of the court. What he sees and hears is a part of the court's knowledge of the case, and ought to be so regarded by all concerned.

9. *Use of Referee in Girls' Cases.* Once more a distinction must be made between criminal and non-criminal proceedings. Probably no one would suggest the reference of a criminal case against an adult. Then why of a criminal case against a juvenile? But in non-criminal matters masters in chancery and statutory referees have familiarized us with the idea of delegation by the court of some part of its judicial authority. I think there is no constitutional reason why a court exercising chancery powers as a juvenile court may not be authorized to appoint a referee not only to examine and recommend but to hear and determine. Masters of discipline in Colorado, juvenile commissioners in North Dakota and referees in Missouri are instances where statutes have expressly authorized such procedure. Other examples are referees in girls' cases. I have never heard a suggestion that rights were thus violated. On the contrary, girls and their parents are likely to deem it an advantage to have both inquiry and action in a woman's hands. Doubtless it is the experience of every man who acts as judge in cases of sex delinquency on the part of girls that, even if he has not the assistance of an official referee, a woman probation officer relieves him of embarrassing investigation and virtually determines the appropriate action.

We may state three general conclusions:

1. In criminal proceedings the child has, before conviction, all the legal rights of the adult. Here the field of socialization is practically limited to treatment of the child after conviction.

2. In non-criminal proceedings there may be, either with or without express legislative authorization, according to the nature of the court, the broad latitude customarily exercised by courts of chancery jurisdiction, this being appropriate and necessary to the full use of parental functions. Here no constitutional provisions relating to criminal prosecutions apply, and socialization of procedure may have wide scope. There are limits, however, of which the judge should never be unmindful.

3. In adopting this broader practice courts should have regard to the popular sense of justice, even when it is not supported by established principles of constitutional law.

Do not these conclusions point toward wider powers, freer action, better and more thoroughly socialized judges for the true juvenile court, and speedy evolution of the criminal court for children into the broader type? This process spells, I think, the liberal development of the family court idea.

Furthermore, while they seem to me in no wise at variance with the growing tendency toward transfer to the public schools of administrative details after adjudication, do they not negative conclusively the assumption by any other agency than a court of justice of the task of adjudicating disputed facts?